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7 RAVI WHITWORTH,
8 Plaintiff,
9 v.
10 SOLARCITY CORP.,
11 Defendant.

Case No.16-cv-01540-JSC

**ORDER DENYING SOLARCITY'S
MOTION TO COMPEL ARBITRATION**

Re: Dkt. No. 15

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13 In this putative class and collective action, Plaintiff Ravi Whitworth ("Plaintiff") contends
14 that his employer, SolarCity Corporation ("SolarCity"), failed to pay overtime wages and failed to
15 compensate employees for all hours worked in violation of federal and state labor laws. Now
16 pending before the Court is SolarCity's Motion to Compel Arbitration pursuant to an arbitration
17 agreement under which participating employees and SolarCity agreed to submit any employment-
18 related disputes to binding arbitration. (Dkt. No. 15.) The action was stayed pending the Ninth
19 Circuit Court of Appeal's disposition of *Morris v. Ernst & Young, LLP*, No. 13-16599. Following
20 the Ninth Circuit's decision, the Court lifted the stay. Having carefully considered the parties'
21 arguments, the Court DENIES the motion to compel as the class action waiver in the parties'
22 arbitration agreement is invalid and unenforceable under the National Labor Relations Act
23 (NLRA) as held by *Morris v. Ernst & Young*, 834 F.3d 975 (9th. Cir. 2016).¹

24 **BACKGROUND**

25 SolarCity provides solar power systems for public and private customers throughout the
26 United States. (Complaint at ¶ 34.) It pays its employee installers on an hourly nonexempt basis

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28 ¹ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 6 & 10.)

1 to provide installation, repair, and maintenance services to its customers. (*Id.* at ¶¶ 36-37.)
2 Plaintiff worked for SolarCity as a Photo Installer II from August 24, 2015 to November 10, 2015
3 in their Berkeley location as a nonexempt hourly employee. (*Id.* at ¶ 11.) In March 2016, Plaintiff
4 filed this putative class and collective action on behalf of himself and a class of similarly situated
5 individuals alleging nine claims for relief under the Fair Labor Standards Act (“FLSA”), the
6 California Labor Code, California’s Private Attorney General Act (“PAGA”), and California
7 Business & Professions Code § 17200 et seq. (Complaint at ¶¶ 73-128.) Plaintiff contends that
8 SolarCity failed to (1) pay employees involved in the installation and maintenance of solar
9 systems for travel time during the workday; (2) provide these same employees with statutorily
10 protected meal and rest breaks; and (3) indemnify these employees for reasonable business
11 expenses. (*Id.* at ¶¶ 40-48.)

12 Plaintiff received an offer packet from SolarCity prior to commencing his employment.
13 The packet contained (1) an offer letter, (2) an employment agreement, and (3) a compensation
14 acknowledgement form. (Dkt. No. 15-1 at 14-38 (Exhibits B-D).²) The offer letter required
15 Plaintiff to sign the employment agreement and noted that Plaintiff must agree that all disputes
16 would be fully and finally resolved by binding arbitration. (Dkt. No. 15-1 at 16.) The
17 agreement—titled “At-will employment, confidential information, invention assignment, and
18 arbitration agreement”—is governed by the Federal Arbitration Act and covers “any disputes.”
19 (*Id.* at 25, ¶ 12.) Among other things, it states:

20 I expressly agree to waive any right to pursue or participate in any
21 dispute on behalf of, or as part of, any class or collective action,
22 except to the extent such waiver is expressly prohibited by law.
23 Accordingly, to the maximum extent permitted by law, no dispute
24 by the parties hereto shall be brought, heard or arbitrated as a class
25 or collective action, and no party hereto shall serve as a member of
26 any purported class, or collective proceeding, including without
27 limitation pending but not certified class actions (“Class Action
28 Waiver”). I understand and acknowledge that this Agreement affects
my ability to participate in class or collective actions. The Company
and I expressly agree that any disputes regarding the validity or
enforceability of the foregoing Class Action Waiver may only be
resolved by a civil court of competent jurisdiction and not by an

² Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 arbitrator. In any case in which (a) a party files a dispute as a class
2 or collective action, and (b) a civil court of competent jurisdiction
3 finds all or part of the Class Action Waiver invalid or unenforceable,
4 then such elements of the dispute for which the court determined
5 that the Class Action Waiver was unenforceable shall be permitted
to proceed in a court of competent jurisdiction, but any remaining
portion of the dispute must still be resolved in arbitration, including
any individual claims or grievances (and in no event shall an
arbitrator have authority to arbitrate any class, collective,
representative, or private attorney general action).

6 (*Id.* at 26, ¶ 12(A)(2).) The agreement further provides that to the extent any court allows a class
7 or collective action notwithstanding the waiver, the employee may proceed with such action in
8 court only after an arbitrator first determines to what extent the employee has been injured as an
9 individual. (*Id.* at 27-28 ¶ 12(A)(4).) There is no dispute that Plaintiff signed the agreement prior
10 to his employment. The compensation acknowledgement form—which Plaintiff likewise
11 signed—required Plaintiff to “submit to binding arbitration.” (*Id.* at 38.) SolarCity’s arbitration
12 policy is also contained in their employee handbook and prior to commencing work Plaintiff
13 signed an “Employee Handbook Acknowledgment and Agreement” which stated that he had read
14 the alternative dispute resolution policy and that he “underst[oo]d SolarCity’s promise to arbitrate
15 all employment-related disputes” and that any dispute was “subject to binding arbitration.” (*Id.* at
16 45.)

17 Shortly after Plaintiff filed this action, SolarCity moved to compel arbitration seeking to
18 enforce the arbitration agreement and class action waiver. (Dkt. No. 15.) The Court stayed the
19 motion pending the Ninth Circuit Court of Appeal’s decision in *Morris v. Ernst & Young, LLP*,
20 No. 13-16599. (Dkt. No. 30.) Following the Ninth Circuit’s ruling, the Court lifted the stay and
21 held a Case Management Conference. (Dkt. No. 35) Although SolarCity sought permission to
22 file a supplemental brief addressing the Ninth Circuit’s decision in *Morris*, it subsequently decided
23 not to do so. (Dkt. No. 40.)

24 **LEGAL STANDARD**

25 The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 2-16, provides that arbitration
26 agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or
27 in equity for the revocation of any contract.” Under the FAA, “arbitration agreements [are] on an
28 equal footing with other contracts,” and therefore courts are required to enforce arbitration

1 agreements according to their terms. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66
2 (2010). “Like other contracts, however, they may be invalidated by ‘generally applicable contract
3 defenses, such as fraud, duress, or unconscionability.’” *Id.* (internal citations and quotations
4 omitted).

5 The FAA espouses a general policy favoring arbitration agreements. *AT&T Mobility v.*
6 *Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745-46, (2011). Federal courts are required to
7 rigorously enforce an agreement to arbitrate. *See Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S.
8 576, 582 (2008). The court must direct parties to proceed to arbitration should it determine: (1)
9 that a valid arbitration agreement exists; and (2) that the agreement encompasses the dispute at
10 issue. *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013); *Cox v. Ocean View*
11 *Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008); *see also* 9 U.S.C. § 4 (“If a court . . . [is]
12 satisfied that the making of the agreement for arbitration or the failure to comply therewith is not
13 in issue, the court shall make an order directing the parties to proceed to arbitration in accordance
14 with the terms of the agreement.”). The party seeking to compel arbitration bears the burden of
15 proving the existence of a valid agreement by a preponderance of the evidence. *See Bridge Fund*
16 *Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010). Courts shall
17 resolve any “ambiguities as to the scope of the arbitration clause itself . . . in favor of arbitration.”
18 *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 476 (1989).

19 DISCUSSION

20 I. The PAGA Claim Cannot be Compelled to Arbitration.

21 The Ninth Circuit has specifically held that a district court cannot compel a plaintiff to
22 arbitrate a PAGA claim. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 431 (9th Cir.
23 2015). SolarCity’s only response is that *Sakkab* was wrongly decided. That argument, of course,
24 is for the United States Supreme Court or an en banc panel of the Ninth Circuit, but not for this
25 Court.

26 II. The Class and Collective Action Claims Cannot be Compelled to Arbitration.

27 Plaintiff argues that he cannot be compelled to arbitration because the class action waiver
28 is unenforceable as it violates the NLRA prohibition on interference with the right of employees to

1 engage in concerted activity and the Norris-LaGuardia Act of 1932, 29 U.S.C. § 101, et. seq.,
2 prohibition on the same. Plaintiff also argues that a recent decision by the National Labor
3 Relations Board concluding that the SolarCity arbitration agreement violated the NLRA
4 collaterally estops SolarCity from seeking to enforce the arbitration agreement here. The first
5 argument is dispositive in light of *Morris v. Ernst & Young*, 834 F.3d 975 (9th. Cir. 2016).

6 In *Morris*, Ernst & Young moved to compel arbitration in response to plaintiffs' putative
7 class and collective action under the FLSA and California labor law. *Id.* at 979. Ernst & Young
8 contended that the action violated plaintiffs' employment agreements and in particular the
9 "concerted action waiver" which required employees to "(1) pursue legal claims against Ernst &
10 Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate
11 proceedings.'" *Id.* In opposition, plaintiffs alleged the arbitration agreement's class waiver
12 provision violated Section 7 of the NLRA, which grants employees the right to "self-organization,
13 to form, join, or assist labor organizations, to bargain collectively through representatives of their
14 own choosing, and to engage in other concerted activities for the purpose of collective bargaining
15 or other mutual aid or protection." 29 U.S.C. § 157. The district court granted the motion to
16 compel arbitration and dismissed the case. The Ninth Circuit reversed.

17 In doing so, the Ninth Circuit noted that "Section 7 protects a range of concerted employee
18 activity, including the right to seek to improve working conditions through resort to administrative
19 and judicial forums." *Id.* at 981 (internal citation and quotation marks omitted). A lawsuit filed in
20 good faith by a group of employees to achieve more favorable terms or conditions of employment
21 is 'concerted activity' under § 7 of the National Labor Relations Act." *Id.* at 981–82. The NLRA
22 thus "establish[es] the right of employees to pursue work-related legal claims, and to do so
23 together." *Id.* at 982. The court concluded that Ernst & Young's requirement that employees
24 pursue work related claims individually was the "very antithesis of § 7's substantive right to
25 pursue concerted work-related legal claims." *Id.* at 983 (internal citation and quotation marks
26 omitted). The concerted action waiver was therefore unenforceable under the NLRA. *Id.* at 983–
27 84.

28 The same conclusion is required here. The SolarCity arbitration agreement contains a class

1 action waiver which prohibits any dispute from being “brought, heard or arbitrated as a class or
2 collective action” and instead requires that it be brought on an individual basis only. (Dkt. No. 15-
3 1 at 26-27.) The arbitration agreement did not provide any opportunity for a prospective
4 employee to opt-out of the agreement and was a condition of Plaintiff’s employment. *Morris*, 834
5 F.3d at 982 n.4 (contrasting *Johnmohammadi v. Bloomingdale’s Inc.*, 755 F. 3d 1072, 1077 (9th
6 Cir. 2014), where there was no NLRA violation because the employee could have opted out of the
7 arbitration agreement). (Dkt. No. 15-1 at 16). SolarCity has not advanced any argument as to
8 why *Morris*’s conclusion regarding a class action waiver does not apply here and the Court can see
9 none. SolarCity’s class action waiver is thus unenforceable.

10 **III. The Class Action Waiver is not Severable.**

11 The Court must consider whether the entire arbitration agreement is unenforceable or
12 whether the unlawful class waiver can be severed from the rest of the agreement. *Morris*, 834
13 F.3d at 990. The arbitration agreement provides that if a court finds that the waiver is
14 unenforceable then “any remaining portion of the dispute must still be resolved in arbitration, prior
15 to any judicial proceeding, including any individual claims or grievances, and including
16 determination of whether any party was ‘aggrieved’ for purposes of any representative action.”
17 (Dkt. No. 15-1 at 26, ¶ 12(A)(3).) This clause seeks to compel Plaintiff to resolve his claims
18 individually rather than collectively and is thus unenforceable for the same reason as the class
19 action waiver. *See Gonzalez v. Ceva Logistics U.S., Inc.*, No. 16-CV-04282-WHO, 2016 WL
20 6427866, at *7 (N.D. Cal. Oct. 31, 2016) (“if the arbitration agreement is enforced, even without
21 the class waiver, [plaintiff] would still be limited to pursuing individual actions in arbitration. And
22 under *Morris*, such a procedure would violate the NLRA by preventing [plaintiff] from pursing
23 her employment claims through collective action.”).

24 And the Court cannot save the arbitration agreement by nonetheless ordering class-wide
25 relief. A court cannot compel arbitration of class claims where the parties did not contract to
26 submit to class-wide arbitration. *Stolt-Nielsen S.A. v. Animal Feeds Int’l. Corp.*, 559 U.S. 662, 684
27 (2010). Here, not only did the parties not contract for class-wide arbitration, the arbitration
28 agreement expressly deprives an arbitrator of any authority to arbitrate any class, collective,

1 representative, or private attorney general action. (Dkt. No. 15-1 at 26, ¶ 12(A)(2).) The entire
2 arbitration agreement is unenforceable.

3 **CONCLUSION**

4 For the reasons stated above, SolarCity's motion to compel arbitration is DENIED. (Dkt.
5 No. 15.) SolarCity shall file its responsive pleading within 14 days.

6 The Case Management Conference remains on calendar for December 8, 2016.

7 **IT IS SO ORDERED.**

8 Dated: November 16, 2016

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11 JACQUELINE SCOTT CORLEY
12 United States Magistrate Judge

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United States District Court
Northern District of California